(1)

83-1715

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. _____

RICHARD GAJEWSKI, Petitioner,

v.

COMMISSIONER OF
INTERNAL REVENUE, Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES W. SHEA
Central Plaza
North Branford, CT 06471
Counsel for the Petitioner
(203) 481-6265

March 14, 1984

15 pp

Question Presented

Whether minimal standards should be pre-set to determine whether an individual's full time method of earning a legal livelihood can be considered a "trade" or "business" for purposes of filing an IRS return; or should each case be determined on its individual merits based upon the trier of fact's assessment of the "facts and circumstances" in each case presented.

Index

Question Presented Page i

Prayer for Review 1

Opinion Below 2

Jurisdiction 2

Statement of Case 2

Reasons for Granting the Writ 5

Conclusion 12

Appendix (Opinion and Judgment, Second Circuit) App. 1

Citations

Ditunno v. Commissioner, 80 T.C. 362 4

Gentile v. Commissioner, 65 T.C. 1 4

Higgins v. Commissioner, 312 U.S. 212 5

Deputy v. DuPont, 308 U.S. 488 7

Flint v. Stone Tracy, 220 U.S. 107 8

Miscellaneous

Section 62(1) 26 U.S.C. 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

RICHARD GAJEWSKI, Petitioner,

v.

COMMISSIONER OF

INTERNAL REVENUE, Respondent,

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

The petitioner Richard Gajewski respectfully prays that a writ of certiorari issue to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit in this proceeding on December 15, 1983.

Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered December 15, 1983 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

Statement of the Case

The facts of the case below have

been stipulated and appear on pages 609, 610, 611 and 612 of the opinion of the U.S. Court of Appeals for the Second Circuit, attached to this petition as Appendix I.

In brief summary, taxpayer-petitioner Gajewski, a full time gambler during the years 1976 and 1977, sought to avoid imposition of a minimum tax on tax preferences as set forth in 26 USC 56, by taking his entire gambling losses as business-expense deductions on Schedule A of his IRS return. The Commissioner assessed deficiencies, claiming that gambling losses are itemized deductions subject to minimum tax on tax preferences. Petitioner sought relief from the U.S. Tax Court.

The Tax Court, having adopted a "facts and circumstances" test in Ditunno v. Commissioner, 80 T.C. 362 (1983), overruled Gentile v. Commissioner, 65 T.C. 1 (1975), which case had been interpreted as meaning that, in order to be engaged in a trade or business one had to hold oneself out as providing goods or services to others. After a review of the facts and circumstances of the instant case, the Tax Court, citing Ditunno, determined that the petitioner was engaged in a trade or business and that therefor his gambling losses were not subject to the minimum tax.

The Commissioner appealed to the Second Circuit which Court reversed, finding that a "facts and circumstances

test" is a "misnomer" and a "non-test." (Appendix at 616) The Second Circuit replaced the "facts and circumstances test" of Ditunno with the "goods or services test" of Gentile.

Reasons for Granting the Writ

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE OF HIGGINS V. COMMISSIONER, 312 U.S. 212 (1941), AS TO THE SCOPE OF EVIDENCE TO BE CONSIDERED IN DETERMINING WHETHER A TAXPAYER IS ENGAGED IN A TRADE OR BUSINESS.

Section 62(1) of Title 26 of the United States Code provides in part that trade and business expenses may be deducted from gross income in order to arrive at an individual's adjusted gross

income.

In Higgins, this Court determined that the review of all facts and circumstances of an individual's situation determined whether he was engaged in trade or business, essentially ruling that the trier of fact, after reviewing all the pertinent facts presented, was best able to determine a taxpayer's status in this regard. In Higgins the Court did not set any minimum standards that must be met in order to conclude that a taxpayer is engaged in a trade or business, although presented with the opportunity to do so.

The Second Circuit, in overruling Ditunno, attempts to reconcile its reliance on "goods or services" with

Higgins, but by its own wording accepts the "facts and circumstances test" as the determinant in that ruling. Stating "In that case (Higgins) the facts and circumstances were . . . ." (Appendix at 616) The Second Circuit notes that "the Court held that his maintenance of records and collection of interest and dividends did not amount to the carrying on of a trade or business." (Appendix at 617) The Second Circuit thus recognized that this Court in Higgins did rely on the facts and circumstances presented to it to determine the status of the taxpayer.

Similarly, the Second Circuit relies upon Justice Frankfurter's concurring opinion in Deputy v. DuPont, 308 U.S. 488 (1940), but fails to

recognize that Higgins, decided one year after DuPont, dealt with the principle of earlier promulgated definitions. Referring to a definition of "Business" as set forth in Flint v. Stone Tracy Company 220 U.S. 107, 171 (1911) it stated, "A definition given for such an issue is not controlling in this dissimilar inquiry." (Higgins at 217) This Court thus noted that dissimilar issues frequently bring about different definitions of what is, or is not, "engaging in a trade or business." The issues in DuPont differ greatly from the matters in Ditunno, where a Minimum Tax issue presents, or with the instant matter, where a taxpayer may be subject to tax on a negative income.

Additionally, by invading the

prerogatives of the trier of fact by setting pre-determined standards, the Second Circuit limits the scope of inquiry for determinating who is and who is not engaged in a trade or business. Gentile itself stands for a review of all the "facts and circumstances," stating that "whether a particular taxpayer's activities amount to the carrying on a trade or business is essentially a factual determination." (Gentile at page 4) In Gentile, a review of the facts resulted in a determination that the petitioner was not carrying on a trade or business. A review of the facts in the instant matter resulted in a decision by the trier of fact (U.S. Tax Court) that the petitioner was engaged in a trade or

business.

The Second Circuit's erroneous reading of Higgins and of Justice Frankfurter's opinion in DuPont not only materially changed the principle laid down by this Court in Higgins, and invaded the prerogatives of subsequent triers of fact by limiting the scope of inquiry permitted to determine a taxpayer's status if he did not meet this arbitrary minimum standard. Whatever other circumstances or facts the trier of fact finds that might outbalance the importance of these pre-determined minimum standards, it will not be permitted to find that a taxpayer is engaged in a trade or business unless he meets these pre-determined minimum standards. If he

fails in these arbitrary matters he is not permitted to deduct business expenses from his gross income.

It has long been recognized that the trier of fact is best able to judge which facts are most relevant to determine which of two or more opposing positions shall be deemed to have carried the day in a dispute. To limit that prerogative is to limit the ability of the trier of fact to get at the truth and to reach a conclusion that is in harmony with the intent of the law to be applied.

The ruling of the Court below places unnecessary restrictions on the latitude rightfully belonging to the trier of fact. It also substantially strays from the principle of Higgins.

This Court should, therefor, determine whether arbitrary restrictive standards should be allowed to bind the trier of fact. Clearly, the Tax Court (Ditunno at 366) wishes to be permitted latitude in weighing all of the facts and circumstances presented to it in reaching a conclusion in such matters.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JAMES W. SHEA
Central Plaza
North Branford, CT 06471
(203) 481-6265
Counsel for Petitioner

March 14, 1984

83-1715 (2)

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. _____

RICHARD GAJEWSKI, *Petitioner,*

v.

COMMISSIONER OF
INTERNAL REVENUE, *Respondent,*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES W. SHEA
Central Plaza
North Branford, CT 06471
Counsel for the Petitioner
(203) 481-6265

March 14, 1984

13 pp

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 347—August Term 1983

Argued: November 10, 1983

Decided: December 15, 1983

Docket No. 83-4121

RICHARD GAJEWSKI,

Petitioner-Appellee,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

Before:

MANSFIELD, PIERCE and MCGOWAN,*

Circuit Judges.

* Of the United States Court of Appeals for the District of Columbia, sitting by designation.

RECEIVED
DEC 28 1983
OFFICE OF CHIEF COUNSEL
INTERNAL REVENUE SERVICE

Appeal by the Commissioner of Internal Revenue from a decision of The United States Tax Court holding that a taxpayer who is a full-time gambler for his own account is engaged in a "trade or business" within the meaning of 26 U.S.C. § 62(1) and therefore entitled to deduct his net gambling losses in arriving at his adjusted gross income for income tax purposes, even though he does not hold himself out as offering goods and services to others. The Tax Court's decision would allow the taxpayer to avoid a tax otherwise due on excess itemized deductions pursuant to 26 U.S.C. § 56(a).

Reversed.

JONATHAN S. COHEN, Attorney, Tax Division, Department of Justice, Washington, DC (Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Bruce R. Ellisen, Attorneys, Tax Division, Department of Justice, Washington, DC, of counsel), *for Respondent-Appellant.*

JAMES W. SHEA, Esq., North Branford, CT, *for Petitioner-Appellee.*

MANSFIELD, *Circuit Judge*:

The issue raised by this appeal pursuant to 26 U.S.C. § 7482 by the Commissioner from a decision of the United States Tax Court is whether a full-time gambler for his own account can be engaged in a "trade or

business" within the meaning of 26 U.S.C. § 62(1) even though he offers no goods or services to others.[1] If so, he could deduct his net gambling losses for purposes of arriving at his adjusted gross income subject to tax, regardless whether his gambling losses exceeded his winnings, and thus avoid a minimum tax that would otherwise be due on excess itemized deductions pursuant to 26 U.S.C. § 56(a).[2] The Tax court held in favor of the taxpayer. We reverse.

The facts have been stipulated. Richard Gajewski was a full-time gambler in 1976 and 1977, who bet solely for his own account and did not act as a bookmaker or hold himself out in any way as offering goods or services to others. His only income was from pari-mutuel wagering on jai-alai. In each of the years in question he incurred

---

1 Title 26 U.S.C. § 62(1) provides:

"SEC. 62. ADJUSTED GROSS INCOME DEFINED.

"For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and business deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee."

2 The applicable version of 26 U.S.C. § 56 was added by § 301a, Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, and amended by § 301(a) Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, provided in pertinent part:

"SEC. 56. IMPOSITION OF TAX.

(a) *General Rule.*—In addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax equal to 15 percent of the amount by which the sum of the items of tax preference exceeds the greater of—

(1) $10,000, or

(2) the regular tax deduction for the taxable year (as determined under subsection (c))."

gambling losses equal to or in excess of his winnings. For the purpose of determining income subject to federal income tax such losses are deductible up to the amount of winnings under 26 U.S.C. § 165(d).[3] Gajewski, however, filed federal tax returns on which he took his entire net losses for each year as itemized deductions in arriving at his adjusted gross income.

The Commissioner assessed deficiencies against Gajewski, claiming that gambling losses are itemized deductions subject to the minimum tax on tax preferences, 26 U.S.C. § 56. He determined that $18,612 was owing for 1976, and $10,667 for 1977. He also assessed an additional tax of $4,653 for the year 1976 pursuant to 26 U.S.C. § 6651(a)(1). In so doing the Commissioner relied on *Gentile v. Commissioner*, 65 T.C. 1 (1975), which held that a taxpayer engaged in gambling solely for his own account, as distinguished from one operating a gambling establishment or bookmaking service, is not engaged in a trade or business because he does not hold himself out to others as offering goods or services, which the Tax Court found to be a necessary element of any trade or business.[4] A contrary ruling would have meant that gambling losses could be "trade or business" deductions under § 62 of the Internal Revenue Code. The latter constitute "adjustments to gross income," rather than itemized (or "below

---

3 Title 26 U.S.C. § 165(d) provides in pertinent part:

"SEC. 165. LOSSES.

* * * * *

(d) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

4 The *Gentile* court was concerned with the meaning of "trade or business" as that phrase is used in the self-employment tax, 26 U.S.C. §§ 1401, *et seq.* Section 1402(c) expressly provides that "trade or business" shall have the same meaning for the self-employment tax as it does in § 162, which relates to trade or business deductions.

the line") deductions, and are expressly excluded from the definition of tax preferences subject to the minimum tax. 26 U.S.C. § 57(b)(1)(A).[5]

---

5 The version of § 57 applicable to 1976 returns is as follows:

"SEC. 57 [as added by Sec. 301(a), Tax Reform Act of 1969, *supra*]. ITEMS OF TAX PREFERENCE.

(a) *In General.*—For purposes of this part the items of tax preference are—

(1) [as amended by Sec. 301(c)(1)(A), Tax Reform Act of 1976, *supra*] *Excess itemized deductions.*—An amount equal to the excess itemized deductions for the taxable year (as determined under subsection (b)).

* * * * *

(b) [as amended by Sec. 301(c)(2), Tax Reform Act of 1976, *supra*] *Excess Itemized Deductions.*—

(1) *In general.*—For purposes of paragraph (1) of subsection (a), the amount of the excess itemized deductions for any taxable year is the amount by which the sum of the deductions for the taxable year other than—

(A) deductions allowable in arriving at adjusted gross income.

* * * * *

exceeds 60 percent (but does not exceed 100 percent) of the taxpayer's adjusted gross income for the taxable year.

The version of § 57 applicable to 1977 returns is the following:

"SEC. 57 [as added by Sec. 301(a), Tax Reform Act of 1969, *supra*.] ITEMS OF TAX PREFERENCE

(a) *In general.*—For purposes of this part the items of tax preference are—

(1) [as amended by Sec. 101(d)(5)(A), Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126] *Adjusted itemized deductions.*—An amount equal to the adjusted itemized deductions for the taxable year (as determined under subsection (b)).

* * * * *

(b) [as amended by Sec. 101(d)(5) (B), (C), Tax Reduction and Simplification Act of 1977, *supra*] *Adjusted Itemized Deductions.*—

(1) *In general.*—For purposes of paragraph (1) of subsection (a), the amount of the adjusted itemized deductions for any taxable year is the amount by which the sum of the deduction for the taxable year other than—

(footnote continued)

Gajewski filed a petition for redetermination of the deficiencies in the Tax Court. In light of *Gentile*, *supra*, he did not argue that he was engaged in a trade or business. However, while his petition was pending, the Tax Court, in a 15 to 4 decision in *Ditunno v. Commissioner*, 80 T.C. 362 (1983) overruled *Gentile*. The court rejected the "goods or services" requirement in favor of what it described as a "facts and circumstances test," under which it would look to all the facts to determine whether the taxpayer was engaged in a trade or business. Applying that test, the *Ditunno* court found that the taxpayer—a full-time gambler like Gajewski—was engaged in a trade or business, and therefore that his gambling losses were not subject to the minimum tax.

The court below ruled that the present case was indistinguishable from *Ditunno* and entered judgment that no tax was owing. T.C. Memo. 1983-133 (March 14, 1983). This appeal followed.

DISCUSSION

The phrase "trade or business" appears in a variety of contexts throughout the Internal Revenue Code. *See*, *e.g.*, § 62(1) (adjustments to gross income); § 162 (trade or business expenses[6]); § 174 (research and experimental

---

(A) deductions allowable in arriving at adjusted gross income,

exceeds 60 percent (but does not exceed 100 percent) of the taxpayer's adjusted gross income for the taxable year.

6 Section 162(a) provides:

"§ 162. *Trade or business expenses*

(a) *In general.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, ..."

costs connected with trade or business); § 280A(c)(1) (home office deductions). However, neither the Code nor the Treasury Regulations define that phrase. As a result, its meaning has been left to the judiciary to develop on a case-by-case basis.

The courts have identified a number of requirements that the taxpayer must satisfy to be engaged in a trade or business. One is that the taxpayer be regularly and actively involved in the activity. *See Stanton v. Commissioner*, 399 F.2d 326, 329-30 (5th Cir. 1968); *McDowell v. Ribicoff*, 292 F.2d 174, 178 (3d Cir.), *cert. denied*, 368 U.S. 919 (1961); *Daily Journal Co. v. Commissioner*, 135 F.2d 687, 688 (9th Cir. 1943). Another is that the taxpayer undertake the activity with the expectation that he will make a profit. *Bessenyey v. Commissioner*, 379 F.2d 252, 255-56 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

Still another requirement—that of "holding one's self out to others as engaged in the selling of goods or services"—finds its genesis in Justice Frankfurter's concurring opinion in *Deputy v. du Pont*, 308 U.S. 488, 499 (1940). Although the Court has never expressly adopted the "goods and services" requirement, it has been implicitly approved. For example, in *Snow v. Commissioner*, 416 U.S. 500 (1974), the Court held the "goods or services" requirement inapplicable to § 174,[7] which allows deduction of research expenses, by contrasting that provision with § 162:

---

7 Title 26 U.S.C. § 174 provides in pertinent part:

"*Research and experimental expenditures*

(a) *Treatment as expenses.*—

(1) *In general.*—A taxpayer may treat research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction."

> "Section 174 was enacted in 1954 to dilute some of the conception of 'ordinary and necessary' business expenses under § 162(a) . . . adumbrated by Mr. Justice Frankfurter in a concurring opinion in *Deputy v. Du Pont*, 308 U.S. 488, 499 (1940), where he said that the section in question . . . 'involves holding one's self out to others as engaged in the selling of goods or services.' " 416 U.S. at 502-03.

Similarly, this circuit in *Grosswald v. Schweiker*, 653 F.2d 58 (2d Cir. 1981), indicated that we consider the "goods or services" requirement to be part of the law. In construing the meaning of the term "trade or business" for the purposes of the Social Security Act we looked to Internal Revenue Code § 162, as required by 42 U.S.C. § 411(c). With respect to § 162, we stated:

> "The theory that a person can be deemed to be carrying on a 'trade or business' only if he 'holds himself out' to the public by offering goods or services originated in Justice Frankfurter's concurring opinion in *Deputy v. du Pont*. . . . Several circuit court and Tax Court cases have developed Justice Frankfurter's language, which, even though it was a single justice's opinion, has been taken by at least one commentator to constitute the view of the Supreme Court. . . ." 653 F.2d at 59-60.

The specific question in *Grosswald* was whether under the "goods or services" requirement one had to "hold one's self out" to more than one "other." We held that it is sufficient to offer goods or services to only one customer. *Accord, Steffens v. Commissioner*, 707 F.2d 478, 481-82 (11th Cir. 1983). *See also, Trent v. Commissioner*, 291

F.2d 669, 670-71 (2d Cir. 1961) (Friendly, J.) (implicitly adopting "goods or services" requirement).

A number of other courts have also implicitly or explicitly adopted the "goods or services" requirement. *See, e.g., Weiberg v. Commissioner*, 639 F.2d 434, 437 (8th Cir. 1981); *Stanton v. Commissioner, supra*, 399 F.2d at 329; *McDowell v. Ribicoff, supra*, 292 F.2d at 178; *Daily Journal Co. v. Commissioner, supra*, 135 F.2d at 688; *Helvering v. Highland*, 124 F.2d 556, 561 (4th Cir. 1942); *Helvering v. Wilmington Trust Co.*, 124 F.2d 156, 158-59 (3d Cir. 1941), *rev'd on other grounds*, 316 U.S. 164 (1942). And, of course, the Tax Court prior to *Ditunno* clearly and repeatedly held that selling goods or services was a necessary element of engaging in a trade or business. *Gentile, supra*; *see also, Gestrich v. Commissioner*, 74 T.C. 525, 529 (1980), *aff'd*, 681 F.2d 805 (3d Cir. 1982); *Green v. Commissioner*, 74 T.C. 1229, 1235 (1980); *Barnett v. Commissioner*, 69 T.C. 609, 613-14 (1978); *Fischer v. Commissioner*, 50 T.C. 164, 171 (1968).

Such was the state of the law until February 1983 when the Tax Court issued its opinion in *Ditunno, supra*. There the court overruled *Gentile*'s reliance on the "goods or services" requirement, reasoning that it had never been adopted by the courts. Instead, the *Ditunno* court adopted what it called a "facts and circumstances" test based on the following language from *Higgins v. Commissioner*, 312 U.S. 212, 217 (1941): "To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." Looking at all the facts and circumstances in the case before it, the *Ditunno* court concluded that the taxpayer was engaged in a trade or business, and therefore that his deductions for gambling losses were not subject to the minimum tax. In the present case, since

Gajewski's situation is the same as that of Ditunno the Tax Court found that the taxpayer was not liable under § 56. It followed that there was no additional tax due under § 6651(a)(1).

In our view the earlier-established "goods and services" requirement rather than the "facts and circumstances" approach is the appropriate minimum standard, assuming the taxpayer's active involvement in the activity with a view to making a profit, for determining whether a taxpayer is engaged in "trade or business." Although the words "trade" and "business" in their broadest sense may refer to any activity engaged in by a person, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 171 (1911); Webster's Third New International Dictionary (1961), pp. 2421-22, 302, they are more commonly viewed as meaning a commercial activity in which a person seeks to earn a livelihood by furnishing goods or services to others for a price. Holding one's self out for such purposes is the universal characteristic of a business man or trader in a free enterprise society.

The "facts and circumstances" approach does not describe a standard at all; it is instead a predicate for application of a legal test. One must first find the relevant "facts and circumstances" in every case before applying the proper standard to those facts. To describe "facts and circumstances" as a test is therefore to adopt a misnomer; the phrase amounts to a non-test. Once the facts and circumstances are ascertained there remains the problem of deciding upon a fair and reasonable standard for determining whether the taxpayer is engaged in a trade or business.

Nor is the "goods and services" standard inconsistent with *Higgins v. Commissioner*, *supra*, relied on by Gajewski. In that case the facts and circumstances were that

the taxpayer incurred substantial expenses in managing his own investments, including the renting of offices and hiring of a staff. Nevertheless the Court held that his maintenance of records and collection of interest and dividends did not amount to the carrying on of trade or business. The *Higgins* taxpayer, moreover, could not have satisfied the "goods and services" test since he did not sell any securities during the relevant period. *Higgins v. Commissioner*, 111 F.2d 795, 796 (2d Cir. 1940), *aff'd*, 312 U.S. 212 (1941). In referring to the necessity for "examination of the facts in each case" the *Higgins* Court did not establish a new standard. Nor did it imply that a person not offering goods or services (such as Gajewski) could be carrying on a trade or business.[8]

We therefore hold that in order to be classified as engaging in trade or business for the purposes of 26 U.S.C. § 62(1) a taxpayer must, as a minimum, have held himself out to others as offering goods or services. Such a requirement, in addition to describing the most common characteristic of the trader or businessman, is administratively workable and fair to taxpayers, unlike the amorphous term "facts and circumstances." Application of the requirement to the present case compels the conclusion that Gajewski was not engaged in a trade or business within the meaning of § 62(1) since he gambled only for his own account and did not operate a bookmaking service or place wagers for others. His net losses were therefore items of tax preference subject to the § 56 tax.

---

8 Although the occupation of professional investor who invests for his own account may be similar in some respects to that of a professional gambler, the former does offer goods to others in the sense that he buys and sells securities. *See Fuld v. Commissioner*, 139 F.2d 465, 468-69 (2d Cir. 1943); *Levin v. United States*, 597 F.2d 760, 765 (Ct. Cl. 1979); *Purvis v. Commissioner*, 530 F.2d 1332, 1334 (9th Cir. 1976).

We see no principled basis for carving out an exception to the "goods or services" requirement for professional gamblers. That task is more properly the province of Congress than of the courts. Indeed, Congress in 1982 acted to exempt gambling losses from the minimum tax for years beginning after 1982. *See* § 201 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 411, codified at 26 U.S.C. § 55. This legislation supports our view that the prior law was to the contrary.

The judgment of the court below is reversed. We remand the case for further proceedings in accordance with this opinion.

700—12-21-83 • USCA—40211

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 243-5775

Office - Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1715

In the Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD GAJEWSKI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Bessenyey v. *Commissioner*, 379 F.2d 252, cert. denied, 389 U.S. 931 4

Deputy v. *du Pont*, 308 U.S. 488 ..... 2, 4

Ditunno v. *Commissioner*, 80 T.C. 362 ..... 2, 3, 4, 6

Estate of Cull v. *Commissioner*, 45 T.C.M. (CCH) 691, appeal pending No. 83-1601 (6th Cir.) 3

Gentile v. *Commissioner*, 65 T.C. 1 2

Groetzinger v. *Commissioner*, 82 T.C. No. 61 (May 24, 1984) 3

Higgins v. *Commissioner*, 312 U.S. 212 ..... 2, 3, 5, 6

Moller v. *United States*, 721 F.2d 810, cert. denied, No. 83-1485 (June 18, 1984) 6, 7

Nipper v. *Commissioner*, 47 T.C.M. (CCH) 136, appeal pending, No. 84-3067 (11th Cir.) 3

Snow v. *Commissioner*, 416 U.S. 500 5

Stanton v. *Commissioner*, 399 F.2d 326 4

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. (& 1976 ed.)):

§ 55(b)(1)(B) 7
§ 55(e)(1)(A) 7
§ 56 (1976 ed.) 1
§ 56(a) (1976 ed.) 2

Page

Statutes—Continued:

§ 57(a)(1) (1976 ed.) 2
§ 57(b)(1)(A) (1976 ed.) 2
§ 62(1) (1976 ed.) 2
§ 62(1) 4, 5
§ 162 4
§ 162(a) 5, 6
§ 165(d) 7
§ 174 4
§ 174(a)(1) 5
§ 274(a) 7
§ 280A(c)(1) 4, 7

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 201(a), 96 Stat. 411 7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1715

RICHARD GAJEWSKI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that his gambling activities did not constitute a "trade or business" for purposes of the minimum tax on tax preferences. The decision below is correct. Petitioner does not allege (nor is there) a conflict among the circuits on the question presented. There is no basis for review by this Court.

1. Petitioner was a full-time gambler during 1976-1977. His only source of income was pari-mutuel wagering on jai-alai (Pet. App. 609). He bet solely for his own account and did not act as a bookmaker or hold himself out in any way as offering goods or services to others (*ibid.*). He incurred gambling losses equal to or in excess of his gambling winnings in both years (*id.* at 610).

Section 56 of the Internal Revenue Code, as it existed during the tax years at issue, imposed a minimum tax on persons whose "items of tax preference" exceeded certain

amounts (26 U.S.C. (1976 ed.) 56(a)). Section 57(a)(1) defined "items of tax preference" to include "excess itemized deductions" (26 U.S.C. (1976 ed.) 57(a)(1)). Gambling losses are generally itemized deductions. Under Section 57(b)(1)(A), however, "excess itemized deductions" for minimum tax purposes were defined to exclude "deductions allowable in arriving at adjusted gross income" (26 U.S.C. (1976 ed.) 57(b)(1)(A)). Section 62(1) provides that deductions allowable in arriving at adjusted gross income — often called "above the line" deductions — include deductions "attributable to a trade or business carried on by the taxpayer" (26 U.S.C. (1976 ed.) 62(1)).

The Commissioner determined that petitioner was not engaged in the "trade or business" of gambling and hence that his gambling losses were not deductions of the sort described in Section 62(1). In so concluding, the Commissioner relied on *Gentile* v. *Commissioner,* 65 T.C. 1 (1975), which held that a taxpayer who gambles solely for his own account is not in a "trade or business" because he does not hold himself out to others " 'as engaged in the selling of goods or services' " (65 T.C. at 5, quoting *Deputy* v. *du Pont,* 308 U.S. 488, 499 (1940) (Frankfurter, J., concurring)). Based on this conclusion, the Commissioner determined that some of petitioner's gambling losses represented "excess itemized deductions," that those excess deductions were "items of tax preference," and that petitioner was therefore liable for minimum tax.

Petitioner sought redetermination of the resulting deficiency in the Tax Court. While his petition was pending, the Tax Court overruled *Gentile* in *Ditunno* v. *Commissioner,* 80 T.C. 362 (1983). In *Ditunno,* the majority[1] noted that, under *Higgins* v. *Commissioner,* 312 U.S. 212 (1941),

---

[1]Judge Tannenwald, the author of *Gentile,* dissented in *Ditunno,* joined by three other judges (80 T.C. at 372-377).

"[t]he proper test of whether an individual is carrying on a trade or business requires an examination of all the facts involved in each case" (80 T.C. at 366-367 (emphasis omitted)). Under this "facts and circumstances test," the *Ditunno* court concluded, the "failure to provide or offer goods and services [should] not [be] sufficient by itself to find that a taxpayer is not carrying on a trade or business" (80 T.C. at 370 (footnote omitted)). This reasoning was based largely on a series of cases which, like *Higgins,* had involved investors in securities and which had ascertained those taxpayers' trade-or-business status by inquiring whether they were "traders" rather than mere "investors," without specifically inquiring whether they offered goods or services (80 T.C. at 370-371). Applying this "facts and circumstances test," the Tax Court in *Ditunno* held that a full-time gambler is engaged in a "trade or business" for minimum tax purposes by virtue of the frequency and regularity of his activities (80 T.C. at 371-372), and the Tax Court similarly concluded that "*Ditunno* control[led]" its decision here (45 T.C.M. (CCH) 967, 968 (1983)). It accordingly held that petitioner's gambling losses were not "items of tax preference" subject to minimum tax.[2]

The Second Circuit unanimously reversed. The words "trade or business," it observed, are "commonly viewed as meaning a commercial activity in which a person seeks to

---

[2]Because of a procedural problem, the Commissioner was precluded from appealing the Tax Court's decision in *Ditunno.* The Commissioner has appealed two subsequent Tax Court decisions that followed *Ditunno,* both of which present the same question as *Ditunno* and this case, viz., the liability of a gambler for minimum tax. *Estate of Cull* v. *Commissioner,* 45 T.C.M. (CCH) 691 (1983), appeal pending, No. 83-1601 (6th Cir. 1983); *Nipper* v. *Commissioner,* 47 T.C.M. (CCH) 136 (1983), appeal pending, No. 84-3067 (11th Cir. 1984). Neither case has yet been argued. In *Groetzinger* v. *Commissioner,* 82 T.C. No. 61 (May 24, 1984), the Tax Court declined to depart from the position it took in *Ditunno,* notwithstanding its reversal by the Second Circuit in this case. Appeal in *Groetzinger* would lie to the Seventh Circuit.

earn a livelihood by furnishing goods or services to others for a price" (Pet. App. 616). It noted that the courts of appeals, as well as the Tax Court before *Ditunno,* have typically regarded the offer of goods or services as a prerequisite to being in a "trade or business" for tax purposes (*id.* at 613-615). And it concluded that this requirement not only describes "the universal characteristic of a business man or trader in a free enterprise society," but also offers a standard that is "administratively workable and fair to taxpayers" (*id.* at 616, 617). Because petitioner "gambled only for his own account and did not operate a bookmaking service or place wagers for others," he was not engaged in a "trade or business" and his gambling losses were thus items of tax preference subject to minimum tax (*id.* at 617).

2. The decision below is correct. The phrase "trade or business," while appearing frequently in the Internal Revenue Code,[3] is defined neither in the Code nor in the regulations, and the courts have thus been left to develop its meaning on a case-by-case basis. The courts have identified several requirements that a taxpayer must meet to be engaged in a "trade or business" for tax purposes, including the requirement that his activities be regular and continuous (*e.g., Stanton* v. *Commissioner,* 399 F.2d 326 (5th Cir. 1968)) and that they be undertaken to make a profit (*e.g., Bessenyey* v. *Commissioner,* 379 F.2d 252 (2d Cir.), cert. denied, 389 U.S. 931 (1967)). Still another requirement — that the taxpayer hold himself out to others as offering goods or services — "finds its genesis," as the court below put it (Pet. App. 613), in Justice Frankfurter's concurring opinion in *Deputy* v. *du Pont,* 308 U.S. 488, 499 (1940). Since then, this so-called "goods or services" requirement

---

[3] *E.g.,* I.R.C. §§ 62(1) (adjustments to gross income), 162 (trade or business expenses), 174 (research expenses), 280A(c)(1) (home-office deductions).

has received general acceptance in the lower courts (see Pet. App. 615 (citing cases)).

Although this Court has never had occasion explicitly to address the "goods or services" requirement, the Court implicitly approved that formula in *Snow* v. *Commissioner*, 416 U.S. 500 (1974). The question there was the proper construction of Section 174(a)(1), which allows a deduction for research expenses incurred "in connection with [a] trade or business." The Court held that the "goods or services" requirement did not apply to Section 174(a)(1), contrasting it in that respect with Section 162(a), which allows a deduction for expenses incurred "in carrying on any trade or business." The Court noted that Section 162(a) is "more narrowly written" than Section 174(a)(1) — since it uses the words "in carrying on" rather than "in connection with" — and remarked (416 U.S. at 502-503):

> Section 174 was enacted * * * to dilute some of the conception of "ordinary and necessary" business expenses under § 162(a) * * * adumbrated by Mr. Justice Frankfurter in a concurring opinion in *Deputy* v. *DuPont*, * * * where he said that the section in question * * * "involves holding one's self out to others as engaged in the selling of goods or services."

This case concerns Section 62(1), which, like Section 162(a), requires "carrying on" a trade or business. The "goods or services" requirement was thus properly applied here as a threshold test for determining whether petitioner was so engaged.

3. Contrary to petitioner's contention (Pet. 5-11), the decision below does not conflict with this Court's decision in *Higgins* v. *Commissioner*, 312 U.S. 212 (1941), nor does it reject what petitioner describes (Pet. 7) as the *Higgins* "facts and circumstances test." The question there was whether expenses incurred by an investor in managing a

large securities portfolio were deductible as trade-or-business expenses under the predecessor of Section 162(a). This Court held that they were not, reasoning that personal portfolio-management is not a "trade or business" regardless of the extent of a taxpayer's wealth or the amount of time expended (312 U.S at 218). The Court did note in *Higgins* (*id.* at 217) that "[t]o determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." But the court of appeals here did examine the facts of this case, holding that petitioner was not in a "trade or business" because he bet solely for his own account and did not offer services to others.

As we noted recently in *Moller* v. *United States,* 721 F.2d 810 (Fed. Cir. 1983), cert. denied, No. 83-1485 (June 18, 1984), the so-called "facts and circumstances test" that petitioner and other taxpayers have sought to derive from *Higgins* is not really a test at all, for it embodies no substantive legal standard (Br. in Opp. 12).[4] "Once the facts and circumstances are ascertained," the court noted correctly below (Pet. App. 616), "there remains the problem of deciding upon a fair and reasonable standard for determining whether the taxpayer is engaged in a trade or business." Nothing in *Higgins* forecloses the "goods or services" requirement, or any of the other requirements developed by the lower courts, as elements of that standard.[5]

---

[4]A copy of our brief in *Moller* is being sent to petitioner's counsel.

[5]There is no merit to the suggestion, advanced by the Tax Court in *Ditunno* (80 T.C. at 370-371), that the "goods or services" requirement is inconsistent with cases which have ascertained the trade-or-business status of securities investors by inquiring whether they are "traders." The "trader versus investor" test grew out of this Court's analysis in *Higgins,* and its particular formulation probably owes to the fact that *Higgins* involved an investor in securities. It is consistent with the "goods or services" requirement because, as noted below (Pet. App. 617

4. Petitioner does not allege, nor is there, a conflict among the circuits on the question presented. Indeed, the Second Circuit below is the first court of appeals to consider the question whether gambling losses are "items of tax preference" for purposes of the minimum tax. As noted above (see page 3 note 2, *supra*), appeals raising this question are now pending in several other circuits. It will be time enough for this Court to consider the issue when and if a conflict develops.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1984

---

n.8), a securities trader holds himself out to others as offering "goods," *i.e.*, stocks and bonds. The Court recently denied certiorari in *Moller* v. *United States*, No. 83-1485 (June 18, 1984), despite the taxpayers' protestations that cases employing the "goods or services" test conflict with those employing the "trader versus investor" test.

[6]Although the question whether a gambler is engaged in a "trade or business" may arise in other contexts — *e.g.*, the deductibility of travel (I.R.C. § 274(a)) or home-office (I.R.C. § 280A(c)(1)) expenses — the narrow question presented here has been resolved legislatively for years beginning after 1982. For those years, gambling losses deductible under Section 165(d) are specifically excluded from the minimum tax base. See I.R.C. § 55(b)(1)(B) and (e)(1)(A) (as amended by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 201(a), 96 Stat. 411).

DOJ-1984-07